

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of)	
)	
i2way Request for Declaratory Ruling)	
Regarding the Ten-Channel Limit)	WT Docket No. 02-196
of Section 90.187(e) of the Commission's)	
Rules)	
)	
Hexagram Petition to Deny i2way)	
Applications)	

TO: The Commission

**REPLY OF HEXAGRAM, INC.
TO OPPOSITION
TO PETITION FOR RECONSIDERATION**

Pursuant to Section 1.106(h) of the Commission's Rules, Hexagram, Inc. submits this Reply to i2way's Opposition to Hexagram's Petition for Reconsideration of the Memorandum Opinion and Order (MO&O) in the above-captioned proceeding.¹

i2way asserts that Hexagram's Petition for Reconsideration is improper and frivolous and an abuse of process because, says i2way, the Commission has previously considered Hexagram's arguments.² If the Commission were to entertain Hexagram's Petition, i2way goes on, it would have to do the same in any other case brought by a party disappointed in a decision.

¹ *i2way Request for Declaratory Ruling*, WT Docket No. 02-196, Memorandum Opinion and Order, FCC 04-108 (released May 5, 2004) (MO&O). i2way's Opposition was filed on June 17, 2004.

² i2way Opposition at 3. i2way does not say where in the MO&O it believes the Commission addressed Hexagram's views.

Hexagram's Petition rests on its claim that the Commission did *not* consider its arguments in the MO&O.³ i2way's reasoning would mean that a party whose arguments are inadvertently overlooked by the Commission can never have any recourse. That would violate fundamental principles of due process. Hexagram is entitled to have its Petition heard.

i2way further objects that Hexagram's request for waiver of Section 1.106(b)(2) does not meet the standard of *WAIT Radio v. FCC*.⁴ But as Hexagram noted in its Petition, the Commission has construed Section 1.106(b)(2) as applying where the petitioner's arguments have previously been considered and rejected.⁵ Because that is not the case here, a waiver of the rule is not strictly required.

Alternatively, if a waiver is required and if the *WAIT Radio* standard applies to a threshold procedural issue, Hexagram's request easily satisfies it. *WAIT Radio* requires the Commission to give due consideration to a well-framed waiver request:

[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.⁶

³ Hexagram Petition for Reconsideration, *passim*.

⁴ i2way Opposition at 2-3, *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Section 1.106(b)(2) generally permits reconsideration of a denied application for review only in light of new, changed, or newly discovered facts. 47 C.F.R. Sec. 1.106(b)(2).

⁵ *E.g., Greater Media Radio Company, Inc.*, 15 FCC Rcd 20485 (2000) ("It is well established that reconsideration will not be granted for the purpose of again debating matters *that have already been fully considered*") (emphasis added).

⁶ *WAIT Radio v. FCC*, 418 F.2d at 1157.

Moreover, the waiver is an important element of the regulatory scheme: "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."⁷ Because sound enforcement must allow for "more effective implementation of overall policy," among other factors, "[t]he limited safety valve [of a waiver] permits a more rigorous adherence to an effective regulation."⁸

The conditions set out by the court are thoroughly met here. Not only is a grant of the requested waiver necessary for the exercise of basic due process, but it will pose no threat to any Commission policy, or to any person. Accordingly, the waiver is in the public interest, and a grant is well within the guidelines of *WAIT Radio*.⁹

Finally, i2way persists in its contention that Hexagram violates a Commission rule by not monitoring its channels. i2way does not say what that rule is; and in fact is no rule requires Hexagram to monitor. True, a secondary user such as Hexagram must avoid causing harmful interference to a primary user,¹⁰ but nothing in the Rules requires that this be accomplished by any particular means.¹¹ The Bureau long ago rejected this argument of i2way's as outside the

⁷ *Id.*, 418 F.2 at 1157 (citations omitted).

⁸ *Id.*, 418 F.2 at 1159 (citation footnote omitted).

⁹ *Id.*, 418 F.2d at 1157 ("[A]llegations such as those made by petitioners, stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look.'")

¹⁰ See 47 C.F.R. Sec. 90.7 (definition of "secondary operation").

¹¹ This contrasts with a trunked user such as i2way, which is required to monitor. 47 C.F.R. Sec. 90.187(b).

scope of the proceeding,¹² and i2way declined to raise it in an application for review.¹³

Accordingly the issue is not presently before the Commission, and must be disregarded.

CONCLUSION

Nothing in i2way's Opposition undercuts Hexagram's request that the Commission reconsider the MO&O by (1) acknowledging that the public notice of i2way's applications failed to give adequate notice of their extraordinary character, and accepting Hexagram's Petition to Deny *nunc pro tunc*; and (2) either holding i2way to its assurances of non-interference to all users, including secondary users such as Hexagram and its customers, or else requiring that i2way's applications be subject to the usual frequency coordination procedures over no more than ten channels at a time pursuant to Section 90.187(e).

Respectfully submitted,

/s/

Mitchell Lazarus
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0440
Counsel for Hexagram, Inc.

June 28, 2004

¹² *i2way Request for Declaratory Ruling*, 18 FCC Rcd 6293 at para. 14 (2003).

¹³ Application for Review of i2way Corporation, WT Docket No. 02-196 (filed May 1, 2003).

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, an employee of the firm of Fletcher, Heald & Hildreth, PLC, certify that this day of June 28, 2004, I have caused the foregoing "Reply of Hexagram, Inc. to Opposition to Petition for Reconsideration" to be sent by first class mail, postage prepaid, to the persons named on the attached service list, except that persons identified as affiliated with the Federal Communications Commission were instead served by hand delivery and by email.

/s/
Deborah N. Lunt

SERVICE LIST

Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Gerald P. Vaughan, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Peter A. Tenhula, Acting Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Catherine W. Seidel, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Scott D. Delacourt
Associate Bureau Chief/Chief of Staff
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

David Furth, Associate Bureau Chief/Counsel
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Shellie Blakeney Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Aaron Goldberger Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

D'wana Terry, Chief
Public Safety & Critical Infrastructure Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Roger Noel, Chief, Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Gayle Heazlett
Enterprise Infrastructure Manager
Denver Water
1600 West 12th Avenue
Denver, CO 80201-3412

Jeremy Denton
Director, Government Affairs
Robin Landis
Regulatory Affairs Assistant
Industrial Telecommunications
Association, Inc.
1110 North Glebe Road, Suite 500
Arlington, VA 22201

Mary E. Brooner
Director, Telecommunications
Strategy & Regulation
Bette Rinehart
National Regulatory Affairs Administrator
Motorola Inc.
1350 I Street, NW, Suite 400
Washington, DC 20005

Larry Miller
President
Land Mobile Communications Council
1110 North Glebe Road, Suite 500
Arlington, VA 22201-5720

L. Sue Scott-Thomas
KNS Communications Consultants
10265 West Evans Avenue
Denver, CO 80227-2089

Robert De Buck
Buck Electric Company
PO Box 1458
Edgewood, NM 87015-1458

The Honorable Pete Domenici
United States Senate
Washington, DC 20510-3101